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No. 84-1081

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL J. MORRISSEY,

Petitioner,

v.

WILLIAM MORROW AND COMPANY
and
BANTAM BOOKS INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The proceedings below are accurately and fully described in the opinion of the Court of Appeals. *Morrissey v. William Morrow & Co.*, 739 F.2d 962, 963-66 (4th Cir. 1984) (also contained in Appendix to Petition for Certiorari at A-2 to A-10 [hereinafter cited as Pet. App.]).

REASONS FOR DENYING THE WRIT

I. The Petition Was Not Filed On A Timely Basis.

Characteristically, petitioner Michael J. Morrissey (Morrissey) failed to file the Petition within 90 days of the judgment of the Court of Appeals.[1] The Petition is not timely under 28 U.S.C. § 2101 (c), and certiorari must therefore be denied.[2]

Judgment in the instant case was entered by the Court of Appeals on July 26, 1984. Appendix to Brief in Opposition at 1a [hereinafter cited as Opp. App.]. The Petition was not filed with the Clerk of this Court until December 28, 1984, fully 155 days following the entry of judgment below. Accordingly, the Petition is over nine weeks too late in this Court.

The untimely efforts of Morrissey, through his counsel in Richmond, Virginia, to obtain a rehearing in the Court of Appeals do not affect the finality of the July 26, 1984 judgment and afford him no additional time in this Court. Under the terms of S.Ct.R. 20.4 (emphasis added):

> [I]f a petition for rehearing is *timely* filed by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

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[1] Morrissey's tardiness at virtually every juncture of this case prompted the Court of Appeals to remark: "'Time and tide wait on no man,' and the district court waited long enough for the present plaintiff." Pet. App. A-18.

[2] Title 28 U.S.C. § 2101(c) provides, in relevant part:

> [A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree.

As is apparent from the face of the Petition, Morrissey's petition for rehearing in the court below was not timely. Under the Federal Rules of Appellate Procedure, a petition for rehearing in a court of appeals must be filed within 14 days after entry of the court of appeals' judgment. Fed. R. App. P. 40(a). Morrissey, however, did not attempt to file his rehearing petition until August 15, 1984, Petition for Writ of Certiorari at 4-5 [hereinafter cited as Pet.], 20 days after the July 26, 1984 entry of judgment by the Court of Appeals, and six days after expiration of the 14-day period allowed by the Federal Rules of Appellate Procedure. The Court of Appeals therefore refused to accept Morrissey's untimely rehearing petition for filing, and indeed, on August 23, 1984, the Court of Appeals denied Morrissey's untimely motion for an extension of time to file a petition for rehearing. Opp. App. 2a. Although the Court of Appeals on September 25, 1984 granted Morrissey's motion for leave to file the rehearing petition out of time (and denied the petition), it is well settled that "[w]here the motion for rehearing is filed out of time the time periods for seeking review by the Court are not affected even if the lower court entertains and considers the motion." 12 J. Moore, Moore's Federal Practice ¶ 607.04 [12], at 9-31 (2d ed. 1982).[3]

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[3] *See* Pfister v. Northern Ill. Fin. Corp., 317 U.S. 144, 150 (1942) ("where out of time petitions for rehearing are filed and the . . . court merely considers whether the petition sets out . . . grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for [appellate] review of the original order"); Chin Gum v. United States, 150 F.2d 765 (1st Cir. 1945) (untimely filing of petition for rehearing before court of appeals, and denial thereof, do not revive jurisdiction of Supreme Court to entertain petition for certiorari).

In sum, Morrissey's consistent tardiness in both this Court and the Court of Appeals precludes this Court's consideration of the Petition. Because of the untimeliness of the Petition, the Writ must be denied.

II. The Petition Raises No Issue That Warrants Review In This Court.

The Petition clearly presents no special or important reasons warranting any exercise of this Court's discretion on certiorari. S.Ct.R. 17.1. As is amply demonstrated by the Court of Appeals' opinion, the instant case involves patently routine applications of state law and uncontroversial procedural rules.

Contrary to the assertions of the Petition, Morrissey was afforded *every* reasonable opportunity for discovery in the district court but simply declined to pursue any, as detailed in the opinion of the Court of Appeals. Pet. App. A-5 to A-8, A-12 to A-18. The Court of Appeals' well-considered ruling that the district court did not abuse its discretion regarding discovery hardly presents any issue worthy of this Court's review on certiorari.

Similarly, Morrissey's contention that the courts below somehow failed to discern factual issues from uncontroverted affidavits—which is based solely on his view of the "proper test" under Virginia law for determining the accrual of his claims, Pet. 11—raises no issue justifying review. Those affidavits concerned Va. Code § 8.01-248, a statute of limitations. This Court, of course, has no jurisdiction to review the lower courts' resolution of the limitations issue, which is obviously a matter of state law.[4]

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[4] The dissenting judge in the Court of Appeals disagreed with

(Footnote continued on next page)

In view of its focus solely upon discovery issues, matters within the district court's discretion, and state law, the Petition clearly presents no occasion for Supreme Court review.

CONCLUSION

William Morrow and Company and Bantam Books Inc. respectfully request that the Petition be denied.

Respectfully submitted,

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(Footnote 4 continued)

the Court of Appeals' opinion *only* with respect to the state-law limitations issue. Pet. App. A-32 to A-45. In agreement with his colleagues, the dissenting judge regarded Morrissey's contentions concerning discovery as "ill-founded." Pet. App. A-27.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

July 26, 1984

TO:
D. Alan Rudlin, Esq.
W. Jeffrey Edwards, Esq.
Brian S. Harvey, Esq.
Bruce W. Sanford, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-1213 this date. The Court's opinion is enclosed.

* * * *

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
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August 23, 1984

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Re: 82-1213, Michael J. Morrissey vs. William Morrow & Co., Inc., et al

Gentlemen:

Appellant's untimely motion for an extension of time to file petition for rehearing has been denied. Appellant may, if he so chooses, address a petition for rehearing to the Court accompanied by a motion for leave to file the petition out of time. If counsel selects this course, appellant's motion and appellees' response will be submitted to the Court for its consideration.

Sincerely yours,

JOHN M. GREACEN

By /s/ Bert Montague

Bert M. Montague
Chief Deputy Clerk